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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

**PUD No. 1 of JEFFERSON COUNTY
 AND THE CITY OF TACOMA,**
Petitioners,
 v.

**STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
 DEPARTMENT OF FISHERIES AND
 DEPARTMENT OF WILDLIFE,**
Respondents.

On Writ of Certiorari to the
 Supreme Court of the State of Washington

**BRIEF OF AMICI CURIAE AMERICAN RIVERS,
 THE AMERICAN FISHERIES SOCIETY, THE COAST
 RANGERS ASSOCIATION, THE CONSERVATION LAW
 FOUNDATION, THE FEDERATION OF FLY FISHERS,
 FRIENDS OF THE EARTH, THE NATIONAL AUDUBON
 SOCIETY, THE NATURAL RESOURCES DEFENSE
 COUNCIL, NEW YORK RIVERS UNITED, THE
 OLYMPIC PARK ASSOCIATES, THE OLYMPIC RIVERS
 COUNCIL, THE PACIFIC COAST FEDERATION OF
 FISHERMEN'S ASSOCIATIONS, THE RIVERS
 COUNCIL OF WASHINGTON, SALMON FOR ALL,
 THE SIERRA CLUB, TROUT UNLIMITED,
 THE WASHINGTON ENVIRONMENTAL COUNCIL
 AND THE WASHINGTON TROLLERS ASSOCIATION
 IN SUPPORT OF RESPONDENTS**

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IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI*

Amici are a collection of organizations that share a strong interest in preventing further decline of this Nation's aquatic resources. They fall into a number of different categories. First, the American Fisheries Society is the world's oldest and largest scientific body dedicated to the advancement of fisheries science and the conservation of renewable aquatic resources. Second, several organizations represent the commercial fishing industry: the Pacific Coast Federation of Fishermen's Associations (which, in turn, has member affiliates from San Diego to Alaska representing several thousand individual working-family fishers), Salmon for All, and the Washington Trollers Association. The Federation of Fly Fishers is a national organization of sport fishers. Yet another group of *amici*—typified by American Rivers—consists of conservation groups that focus their efforts on the preservation of this Nation's rivers and other waterways.¹ Finally, a number of *amici*—typified by the 600,000-member Sierra Club—combine this concern with broader efforts to protect the natural environment.²

All of the *amici* have a commitment to the revitalization of the anadromous fishery of the Pacific coast and to the preservation of the Nation's aquatic resources as a whole. They are concerned that this effort would be compromised if this Court were to rule that states may not, when they are asked to issue certifications under section 401 of the Clean Water Act, 33 U.S.C. § 1341, take into account the potentially devastating impact on

¹ Others in this group are New York Rivers United, the Olympic Rivers Council, the Rivers Council of Washington, and Trout Unlimited.

² Other groups in this final category are the Coast Range Association, the Conservation Law Foundation, Friends of the Earth, the National Audubon Society, the Natural Resources Defense Council, Olympic Park Associates, and the Washington Environmental Council.

fish caused by diversions of water through hydroelectric projects.

SUMMARY OF ARGUMENT

1. This case concerns the scope of the power granted to states under section 401 of the Clean Water Act ("CWA"), 33 U.S.C. § 1341, which requires a state certification of compliance with various provisions of the Act before a federal agency may issue a license or permit for any activity that may involve a discharge into navigable waters. Petitioners argue that the state review in this case should not have extended to the issue of minimum stream flow because that issue will be considered by the Federal Energy Regulatory Commission ("FERC") when it considers licensing their hydroelectric project. But the same argument could be made with respect to *any* water-quality issue that a state might consider, because there is always a potential overlap with FERC's decisionmaking. That potential for overlap is irrelevant, since Congress plainly intended a dual, state/federal review of these issues.

2. Section 401 requires states to determine whether "discharges" resulting from federally licensed projects will comply with various provisions of the Act and with each state's federally mandated Water Quality Standards. 33 U.S.C. § 1341(a), (d). The statutory language, the legislative history, and administrative interpretations of the Act all indicate that the term "discharge" was to have a broad meaning, going beyond discharges of "pollutants" from "point sources" to include most if not all of the other forms of "pollution" recognized in the Act. One such form of pollution is "changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, or flow diversion facilities." *Id.* § 1314(f)(2)(F).

Once the breadth of the term "discharge" is understood, it becomes apparent that there are at least two discharges that are both features of petitioners' project

and directly linked to the particular violation that the State sought to prevent. One is the construction of the dam itself, which will involve the pouring into the river of large amounts of concrete and other materials. The appropriateness of treating the dam itself as a "discharge" is confirmed by another section of the CWA, section 404, 33 U.S.C. § 1344, which uses the more specific term "discharge of dredged or fill material." The applicable regulations specifically define this narrower category of discharges as including construction of dams. 33 C.F.R. § 323.2(f); 40 C.F.R. § 232.2(f). It follows that the broader term "discharge" in section 401 must also include dam construction, and it is this "discharge" that will cause the diversion of water degrading the river as a fishery.

Moreover, another relevant discharge will be the emission of *non-diverted* water through the dam's sluice gate or spillway. This discharge as well is directly linked to the harm that the State sought to prevent, because that harm results from the low volume of this discharge.

3. The State was not limited to considering only those impacts of the dam that would conflict with a specific "criteria" listed in its federally mandated Water Quality Standards. The Standards specifically reflect "use" of the Dosewallips River as a habitat for salmon and other fish. Moreover, they include (as required by federal regulations) a flat prohibition of any degradation of any existing beneficial use. The State here determined that the Elkhorn project would, absent minimum stream flows at the level specified by the State, degrade the use of the river as a fishery. It therefore had the power and duty to prevent such degradation when petitioners sought a certification under section 401.

In any event, section 401(d) also authorizes states to impose conditions on their certifications that serve to enforce "any other appropriate requirement of State law." 33 U.S.C. § 1341(d). This phrase must at least include state laws that serve to protect water quality and prevent degradation of uses. Here, the State of Washington had

such a law in place—Wash. Rev. Code § 90.54.020(3)(a) (1992), which requires retention of "base flows" needed to preserve fish and other wildlife. This law provided an alternative basis for the State's action in this case.

4. This case does not involve an unwarranted extension of the Clean Water Act into a new realm, where it will interfere with state water laws or with FERC's role as regulator of the electric-power industry. Allowing *states* to address minimum stream flows (rather than giving FERC exclusive control) can hardly be deemed an intrusion on state control over water allocation. Moreover, no existing water right is threatened in this case. In any event, while the CWA does contain provisions addressing this concern, *see* 33 U.S.C. §§ 1251(g), 1370(2), those provisions are properly interpreted as only requiring an accommodation of state regimes for water allocation where this is possible, consistent with the protection of water quality.

As for the potential for interference with FERC's role, Congress plainly did not intend to give FERC the authority to make a policy judgment favoring a project that would violate State Water Quality Standards by degrading existing beneficial uses. Any balancing of competing policies by FERC is constrained by the requirement that these Standards be respected, and that requirement is enforced by giving states the certification power under section 401.

ARGUMENT

Under section 401 of the CWA, any applicant for a federal permit to conduct an activity that may result in a discharge into navigable waters is required to obtain a state certification of compliance with various specified provisions of the Act. Petitioners argue that section 401 did not authorize the State of Washington to condition its certification of the Elkhorn project on preservation of the stream flow at the level needed to protect the "existing use" of the Dosewallips River as a habitat for salmon

and steelhead trout. In reality, however, *all* of the usual tools of statutory construction—including the statutory language, the structure and purpose of the Act, and its legislative history—point in the opposite direction. Indeed, as we demonstrate below, the Environmental Protection Agency (“EPA”), which administers the Clean Water Act, has repeatedly addressed the issues presented here and has concluded that states do have the power under section 401 to protect fisheries from diversions of water caused by hydroelectric and other projects. It follows that there is no reason to reverse the ruling of the Supreme Court of Washington.

I. THE ISSUE IN THIS CASE IS NOT THE AUTHORITY EXERCISED BY FERC BUT THE AUTHORITY GRANTED TO STATES UNDER THE CLEAN WATER ACT.

The actions of the State of Washington challenged in this case were undertaken pursuant to a federal statute, section 401 of the CWA, which specifically requires state certification of compliance with other provisions of the Act before any federal agency can proceed to license an activity that may involve a discharge into navigable waters. In such a case, Congress plainly intended a *dual* state/federal regulatory process. Moreover, in creating that process, Congress in no way suggested that states are barred from addressing the same environmental concerns that also play a role in the relevant federal agency’s licensure determination.

Petitioners invite this Court to treat the case as if it involved a preemption question like the one presented in *California v. FERC*, 495 U.S. 490 (1990). Pointing to language in the Federal Power Act (“FPA”), 16 U.S.C. § 797(e), they begin and end their argument by suggesting that states’ authority under section 401 should be limited in order to preserve FERC’s supposedly “comprehensive” control over hydroelectric projects in general and over “minimum stream flows” in particular. Br. at 19-21,

46-49. But the FPA would only have controlling significance in this case if there were some inconsistency between that statute and the Clean Water Act. If that were true, there would indeed be a need to “harmonize” the two acts.

The reality is quite different. Congress in the FPA did give to FERC the primary role in licensure of hydroelectric projects. See 16 U.S.C. § 797(e). But it also gave independent roles to various other regulatory bodies. Thus, for example, where a project is within an Indian reservation, the FPA itself requires FERC to include in the license “such conditions as the Secretary [of the Interior] shall deem necessary for the adequate protection and utilization of such reservation.” *Ibid.*; see *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772-79 (1984). Similarly, a party seeking to construct a hydroelectric project must obtain, in addition to a FERC license, a permit under section 404 of the CWA, 33 U.S.C. § 1344, which requires the Army Corps of Engineers to consider the environmental impacts of any “discharge of dredged or fill material into the navigable waterways.” See *Monongahela Power Co. v. Marsh*, 809 F.2d 41, 45-46 (D.C. Cir.), *cert. denied*, 484 U.S. 816 (1987). Finally, the Federal Land Policy and Management Act requires that a right of way be issued by the Bureau of Lands Management or the Forest Service for any FERC-licensed electric power project on public lands, see 43 U.S.C. § 1761(a)(4), and these other agencies may impose conditions designed “to assure that the use . . . would not substantially degrade the natural and cultural resources of the affected lands,” H.R. Rep. No. 474(VIII), 102d Cong., 2d Sess. 153 (1992).

State certification under section 401 is simply one more part of the approval process, applicable to all projects that require federal permits and may involve discharges—including hydroelectric projects licensed by FERC. Indeed, Congress, when it enacted section 401, specifically antici-

pated that this provision could be used to block hydroelectric projects within the jurisdiction of FERC's predecessor, the Federal Power Commission. The Senate Report on the Federal Water Pollution Control Act Amendments of 1972 recognized the "authority of the State . . . to act to deny a permit and thereby prevent a Federal License or permit from issuing to a discharge source within such State," adding that "[s]hould such an affirmative denial occur no license or permit could be issued by such Federal agencies as the . . . Federal Power Commission . . . unless the State action was overturned in the appropriate courts of jurisdiction." S. Rep. No. 414, 92d Cong., 1st Sess. 69 (1971). It follows that it would make no sense to limit the scope of state authority under section 401 in order to protect a perceived paramount role supposedly reserved for FERC.

Indeed, such a theory would lead to absurd results. It would mean that the language of section 401 would take on different meanings (*i.e.*, authorize different types or degrees of state review) depending on whether section 401 is triggered by a FERC license application or, instead, by an application under some other federal statute, such as the Atomic Energy Act, *see* 42 U.S.C. § 5843 (requiring Nuclear Regulatory Commission approval for nuclear power generation facilities), or the River and Harbor Act of 1899, *see* 33 U.S.C. § 401 (requiring a permit from the Army Corps of Engineers for any structure built in navigable waters).

More fundamentally, it cannot matter that there is an overlap between the issues that a state considers under section 401 and the issues that FERC considers in licensing a hydroelectric project under the FPA. After all, *any* water-quality concerns that a state might consider in response to a certification request, including those that petitioners would concede are proper, must, of necessity, have at least some limited overlap with FERC's open-ended mandate to weigh all aspects of a project's environ-

mental impact (along with other factors) under the FPA.³ Thus, if states were barred from rejecting or conditioning certifications based on factors that might later be considered by FERC, section 401 would effectively be left with no role to play in the process for approval of hydroelectric projects. Even petitioners do not claim that this outcome would make any sense. *Cf. Escondido Mut. Water Co.*, 466 U.S. at 776-77 (upholding the independent authority of the Secretary of the Interior to impose conditions on FERC licenses in order to protect Indian reservations, even though FERC was simultaneously required to consider the same issue).

In sum, in deciding this case, the proper place to begin and end the analysis is with the CWA itself. That federal statute gave the states the power and duty to certify the legality of proposed federally licensed projects. If this certification requirement, as a general rule, encompasses a project's impact on a waterway's "existing use" as a fishery, there is no basis for applying a different rule in cases like this one, involving hydroelectric projects.

II. THE REFERENCES TO "DISCHARGES" IN SECTION 401 IN NO WAY PRECLUDE STATE CONSIDERATION OF MINIMUM STREAM FLOWS IN CONNECTION WITH HYDROELECTRIC PROJECTS.

When they turn to the Clean Water Act itself, petitioners start by arguing that the State went too far when it specified a minimum stream flow, because any harm caused by the Elkhorn project's diversion of water will not be a

³ *See* 16 U.S.C. § 797(e) ("In deciding whether to issue any license under this Part for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.").

result of a "discharge" as that term is used in section 401. This contention is simply incorrect. When section 401 is read in the context of the entire Act, it becomes clear that the provision did authorize the State to take action when it determined that the construction of a dam in a river would, absent modifications, lead directly to significant degradation of the river as a habitat for fish in violation of federally mandated Water Quality Standards.

A. The Meaning of "Discharge."

As petitioners note, section 401 is triggered when a project "may result in any discharge," and the State is then required to certify that "any such discharge will comply" with sections 301, 302, 303, 306 and 307 of the Act. 33 U.S.C. § 1341(a). Section 401(d) then authorizes the State to impose conditions in its certification designed to assure compliance with these sections "and with any other appropriate requirement of State law." *Id.* § 1341(d).⁴ Petitioners acknowledge only two possible "discharges" associated with their project: temporary releases of pollutants during the construction process and the "discharge" of water at the end of the "tailrace" after the water has been used to generate electricity. *See Br.* at 27-28. They then argue that any degradation of the river as a fishery might be caused by the overall project but has nothing to do with these discharges. It follows, in their view, that the State lacked the authority under

⁴ Although section 401(d) omits any reference to section 303 of the CWA—the provision mandating State Water Quality Standards—petitioners acknowledge that conditions in certifications may still be based on Water Quality Standards, because section 303 is incorporated by reference through § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C). *See Pet. Br.* at 9. We note that when Congress amended section 401(a) in 1977 to add a reference there to section 303, the Conference Report stated that this was done solely for the sake of clarity, and that "[s]ection 303 is always included by reference where section 301 is listed" elsewhere in the Act. H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 96 (1977).

section 401 to condition its certification on measures designed to prevent such a degradation.

This approach is entirely misguided. It depends, first of all, on the proposition that Congress intended to limit states' power by using the term "discharge" in a narrow and technical sense. In fact, precisely the opposite is true. The text of the statute, its history and purpose, and the consistent administrative interpretation all indicate that the term "discharge" in section 401 was intended to have a broad scope—encompassing most if not all of the ways in which a federally licensed project might interfere with water quality, including through diversion of water by a dam.

Section 401 was enacted as part of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 877 (1972). Its predecessor was section 21(b) of the Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91 (1970), which also required state certifications for every federally licensed "activity . . . which may result in any discharge into the navigable waters." In such circumstances, states were asked to certify "that there is reasonable assurance . . . that such activity will be conducted in a manner which will not violate applicable water quality standards." *Ibid.* Thus, when Congress passed section 401, it carried forward the requirements of a "discharge" as a trigger for the certification requirement, but changed the wording by relating the state certification to this "discharge," rather than to the underlying "activity."

There is no reason to believe, however, that in making this change, Congress saw any real difference between certifications addressing the water-quality impact of an activity as opposed to a discharge. The legislative history describes section 401 as being substantially the same as section 21(b), and the circumstances suggest that the only reason for the change in phraseology was the new

emphasis in 1972 on limiting effluent "discharges."⁵ The certification requirement was extended to cover not only compliance with water quality standards but also compliance with a series of new provisions governing effluent discharges. It thus made sense to refer to the effect of "discharges." But there is no indication that Congress also intended to cut back on states' previously granted power to consider all of the ways in which a project might impact on water quality. Indeed, in 1977, when Congress again amended section 401, the conference report paraphrased the section as still providing that a "federally licensed or permitted activity . . . must be certified to comply with State water quality standards." H.R. Conf. Rep. No. 830, at 96 (emphasis added).

As for the EPA, it has never suggested that state reviews under section 401 are limited to consideration of the effects of some narrowly defined category of "discharges." See *The Federal Energy Regulatory Commission's Hydropower Licensing Program: Hearing Before the Subcomm. on Environment, Energy, and Natural Resources of the House Comm. on Government Operations*, 102d Cong., 2d Sess. 91 (1992) (Statement of Martha G. Prothro, Deputy Assistant Administrator, Office of Water, EPA) (hereinafter "Statement of Martha G. Prothro") ("States are authorized to issue, condition, deny, or waive certification of certain Federal permits or licenses that may affect the physical, chemical, or biological integrity of our waters."); EPA, *Wetlands and 401 Certification: Opportunities and Guidelines for States and Eligible Indian Tribes* 20 (Apr. 1989) ("The purpose

⁵ See S. Rep. No. 414, at 69 (Section 401 "is substantially section 21(b) of existing law . . . amended to assure consistency with the bill's changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants."); H.R. Rep. No. 911, 92d Cong., 2d Sess. 121 (1972) ("Section 401 is substantially section 21(b) of the existing law amended to assure that it conforms and is consistent with the new requirements of the Federal Water Pollution Control Act.").

of the water quality certification requirement, the Congress said, was to ensure that no license or permit would be issued 'for an activity that through inadequate planning or otherwise could in fact become a source of pollution.'") (quoting 1969 legislative history).⁶ To the contrary, EPA has taken the position that, once at least one potential "discharge" caused by a project has been identified, state certifications can and should address all ways in which the project may impact on water quality. See *id.* at 23 ("[A]ll of the potential effects of a proposed activity on water quality—direct and indirect, short and long term, upstream and downstream, construction and operation—should be part of a State's certification review.").

But the clearest indication of Congress's intent is the fact that, if the goal was to limit state reviews to some narrow subset of the ways in which projects degrade water quality, Congress chose a particularly inapt way to express that intent. Section 502(16) of the CWA provides that the "term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." 33 U.S.C. § 1362(16) (emphasis added). The use of the word "includes" in this subsection contrasts with nearly all of the other definitions in the Act, which set out what a particular term "means." This phrasing, by itself, suggests that the term should be read inclusively rather than narrowly. That conclusion is reinforced by reference to the separate definition of the narrower term "discharge of a pollutant," which "means . . . any addi-

⁶ Indeed, EPA has not, since 1972, seen any need to amend its section 401 regulations to bring them into conformity with the new statutory phrasing. See 40 C.F.R. § 121.2(a)(3) (requiring state certification that a federally licensed "activity will be conducted in a manner which will not violate applicable water quality standards") (emphasis added).

⁷ This interpretation of the CWA by EPA, like all of the others cited here, is entitled to substantial deference from this Court. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-45 (1984).

tion of any pollutant to navigable waters from any point source." *Id.* § 1362(12) (emphasis added). A "pollutant," in turn, is defined as any one of a lengthy list of specific kinds of waste products (along with "heat") that are "discharged into water."⁸ Taken together, all of these definitions indicate that the term "discharge," when used "without qualification," was intended to have a broad scope, including *but not limited to* pollution caused when "pollutants" flow into a river from particular "point sources" like pipes or ditches. See *National Wildlife Fed'n v. FERC*, 912 F.2d 1471, 1483-84 (D.C. Cir. 1990) (applying section 401 and treating upstream soil erosion caused by a reservoir as a "discharge" originating at the dam); *Power Auth. v. Williams*, 475 N.Y.S.2d 901, 904 (1984) ("discharge" is defined broadly in section 401 and should be construed to allow states to "eliminate conditions of pollution . . . arising from causes other than specific discharges of identifiable pollutants").⁹

The question then becomes what other phenomena, beyond discharges of pollutants from point sources, constitute "discharges" for purposes of section 401. The answer is some or all of the "nonpoint sources of pollution" identified in the Act. Consistent with the broad statutory objective of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), Congress recognized in the CWA

⁸ The definition lists "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). A "point source" is defined as a "discernible, confined and discrete conveyance" such as a pipe, ditch or channel. *Id.* § 1362(14).

⁹ The two cases on which petitioners rely, *National Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988), and *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), see Pet. Br. at 29-30—are totally inapposite since they deal with the scope of the narrower term "discharge of a pollutant" as it is used elsewhere in the Act.

that water pollution takes many forms. Thus, it defined "pollution" as the "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." *Id.* § 1362(19). And it focused attention not only on point source discharges but also on "nonpoint sources of pollution." Specific examples include dispersed releases of pollutants such as "runoff" from agricultural, mining and construction activities, 33 U.S.C. § 1314(f)(2)(A)-(C), and "changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways or flow diversion facilities," *id.* § 1314(f)(2)(F).¹⁰

EPA has made clear that section 401 can and should be used to control nonpoint sources of pollution. *National Guidance: Wetlands and Nonpoint Source Control Programs* 14 (June 1990). Moreover, petitioners themselves concede that some nonpoint sources of pollution in both of the categories mentioned above constitute "discharges" as that term is used in section 401. Thus, they endorse the provisions in the State's certification aimed at controlling inadvertent releases of pollutants during construction. Pet. Br. at 27-28 & n.19. And they acknowledge that states could properly address some of the physical changes caused when dams impede the flow of water, such as "low dissolved oxygen, dissolved minerals and nutrients, cooled water, sediment, or dissolved gases such as nitrogen." Br. 27 n.18.¹¹ In sum, even petitioners

¹⁰ See also EPA, *Nonpoint Source Guidance* app. B (Dec. 1987) (listing "Major Nonpoint Source (NPS) Pollution Categories and Subcategories," including both general "Construction" and "Hydrologic/habitat Modification" through "Dam construction"). EPA has estimated that "[n]onpoint source pollution accounts for well over half of all impairments to water quality standards in rivers and lakes and an estimated 45 percent of impairments in estuaries." *National Guidance: Wetlands and Nonpoint Source Control Programs* 1 (June 1990).

¹¹ See *National Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (discussing such effects of dams as nonpoint sources); *National*

recognize implicitly that the term “discharge” in section 401 is broadly defined to cover at least a large portion of the diverse phenomena that constitute “pollution” under the CWA.

B. “Discharge” in the Present Context.

With these general principles in mind, it becomes immediately apparent that petitioners err when they describe only two “discharges” associated with their project. There are others as well, and there is every reason to conclude that Congress intended to allow states to consider all of them.

1. *The Dam Itself as a Discharge.* To begin with, common sense would suggest that the placement of a dam in the Dosewallips River—accomplished by pouring large amounts of concrete and other construction materials into the riverbed—constitutes a “discharge” into the waterway. In this instance, moreover, common sense is confirmed by reference to another place in the statute where Congress used the same word.

Section 404(a) of the CWA authorizes the Army Corps of Engineers to issue permits for the “discharge of dredged or fill material into the navigable waters.” 33 U.S.C. § 1344(a). On its face, this section indicates that a “land fill” project—*i.e.*, the displacement of a body of water by a permanent deposit of earth or other material—constitutes a “discharge.” As a logical matter, it makes sense to view a dam as falling within this category. And, indeed, the applicable regulations promulgated both by the Corps and by EPA confirm that the term “discharge of fill material” includes the “building of any structure

Wildlife Fed’n v. Gorsuch, 693 F.2d 156 (same); *Missouri v. Department of the Army*, 672 F.2d 1297, 1304 (8th Cir. 1982) (same). These concessions are hardly surprising since, without them, petitioners could not explain why it is universally recognized that a section 401 certification is required for the construction and operation of all federally licensed hydroelectric projects. See Pet. Br. at 27.

or impoundment requiring rock, sand, dirt, or other material for its construction; . . . [and] *dams and dikes*.” 33 C.F.R. § 323.2(f) (emphasis added); see 40 C.F.R. § 232.2(f) (using identical language). It is for this reason that a permit from the Corps is required for every dam that is proposed for the navigable waters, including hydroelectric projects. See *Monongahela Power Co. v. Marsh*, 809 F.2d at 46 (“Indisputably, construction of Monongahela’s proposed hydroelectric facility will entail discharges of dredged and fill material into navigable water.”).

But if a new dam would be a “discharge of fill material” for purposes of section 404, it surely must be a “discharge” for purposes of section 401 as well. The latter term, after all, is broader than the former, and appears in the same statute. See *Commissioner v. Keystone Consol. Indus., Inc.*, 113 S. Ct. 2006, 2011-12 (1993) (broader statutory term “any direct or indirect . . . sale or exchange” must at least include the narrower category of a “sale or exchange”). And, in fact, it is well established that the two sections work in tandem, in the sense that a section 401 certification is required for every “discharge” also covered by section 404. See *Keating v. FERC*, 927 F.2d 616, 619 (D.C. Cir. 1991) (state certification is required for any project requiring a permit under section 404); EPA, *Wetlands and 401 Certification*, *supra*, at 20 (same); 33 C.F.R. § 336.1(a)(1) (“CWA requires the Corps to seek state water quality certification for discharges of . . . fill material into waters of the U.S.”).

At times, petitioners seem to suggest that there was something unusual about the State’s consideration of the hydrologic effects of the Elkhorn dam under a statute linked to “discharges.” But that is precisely what the Army Corps of Engineers does when it is deciding whether to grant a section 404 permit for a “discharge

of dredged or fill material." See 40 C.F.R. §§ 230.30-.32 (guidelines for assessing whether a diversion of water will impair existing habitats for wildlife); *Monongahela Power Co. v. Marsh*, 809 F.2d at 43 (an example of a case where the Corps denied a permit for a project because the dam would have inundated important habitats); *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 512-13 (10th Cir. 1985) (rejecting the argument that the Corps could not consider the effects of a reduction in flow on wildlife because it was not directly tied to a "discharge"). The EPA, in turn, has suggested that states themselves should use the same section 404 guidelines applicable to the Corps in determining whether a particular project will result in degradation of the state's waters. See EPA, *Wetlands and 401 Certification*, *supra*, at 14, 16-17; EPA, *Water Quality Standards for Wetlands: National Guidance* 20 (July 1990). See also Statement of Martha G. Prothro, *supra*, at 94 ("EPA . . . has taken steps to support States as they consider the full range of water quality impacts when evaluating Federal permits under Section 401 and licenses, including hydropower licenses. *The types of potential adverse impacts associated with hydropower projects include loss or degradation of aquatic habitat; impacts on wildlife, fisheries, and endangered species that are dependent upon the aquatic environment; . . . and significant changes in water flow volumes and timing.*") (emphasis added).

The real oddity would be a reading of the statute that prevented states from considering one of the direct effects on water quality caused by the placement of a dam in the middle of a river.¹² Under this reading, if a proposed dam or other structure had the effect of entirely eliminating the flow of a river (or obliterating a wetland), a

¹² The very provision requiring State Water Quality Standards provides that they "shall be established taking into consideration [the] use and value" of a state's waters for, among other things, "propagation of fish and wildlife." CWA § 303(c)(2), 33 U.S.C. § 1313(c)(2). Yet petitioners now suggest that states are powerless to protect fish from this kind of destruction.

state would have no role to play in the process because the project would not entail a "discharge" of water or pollutants. Concomitantly, if a project did allow a continued trickle of water, there would be a "discharge" under petitioners' theory, but the State could only take steps to prevent changes in the "condition" of the water in this trickle—not to augment its volume. It is hard to imagine a less sensible interpretation of a statute that is designed to allow states to protect all of the existing beneficial uses of their waters, and to attain any additional uses designated in their Water Quality Standards. See § III *infra*.

2. *The Discharge from the Dam.* In any event, even accepting petitioners' more restrictive understanding of the term "discharge," they ignore one feature of their proposed project. The water that is *not* diverted for use in generating electricity will be "discharged" from the dam through a sluice gate or spillway of some kind. See Pet. Br. 28 n.20.¹³ This discharge, in turn, is directly linked to the degradation of the river as a fishery, because that harm results from the low volume of the discharge. For this reason as well, it is clear that the State was correct in determining that the Elkhorn project would, absent imposition of minimum stream flows, include "discharges" that did not "comply with" the State's Water Quality Standards, as these terms are used in section 401.

III. THE STATE HAD AMPLE LEGAL BASIS FOR ITS DECISION TO PROTECT THE USE OF THE RIVER AS A HABITAT FOR FISH.

In their second argument, petitioners move from a very restrictive definition of the "discharges" that trigger the certification requirement to an equally restrictive analysis of the standards that states may apply in considering the effects of such discharges. Conceding that a state may

¹³ It is hard to see how this feature is any less a "discharge" than the emission of the remaining water from the tailrace.

deny or condition a certification where necessary to enforce its Water Quality Standards promulgated pursuant to section 303 of the CWA, 33 U.S.C. § 1313, they argue that such enforcement must be directly linked to one component of the standards—the “criteria” section. But this argument reflects a fundamental misunderstanding of how State Water Quality Standards work. It also ignores Congress’s deliberate decision to allow states to impose conditions designed to enforce “other appropriate requirement[s] of State law.” CWA § 401(d), 33 U.S.C. § 1341(d).

A. Degradation of the Use of the Dosewallips River as a Habitat for Fish Would Violate the State’s Water Quality Standards.

Under section 303, all states are required to promulgate Water Quality Standards. As petitioners acknowledge, Pet. Br. 31, a state asked to issue a certification under section 401 is authorized, indeed required, to take into account any conflict between the proposed project and its Water Quality Standards. See 40 C.F.R. § 121.2 (a)(3) (state must certify that the activity “will be conducted in a manner which will not violate applicable water quality standards”); EPA, *Wetlands and 401 Certification*, *supra*, at 8 (“[T]he States’ water quality standards are a critical concern of the 401 certification process.”).¹⁴ The only issue here is what *parts* of the standards are independently enforceable and thus provide a basis for a denial of, or condition on, certification.

Water Quality Standards, which must be approved by the EPA, have three components: a “designation of uses” for each body of water, 40 C.F.R. § 131.10, a set of “water quality criteria” protecting the designated uses,

¹⁴ Indeed, these standards were the only guidepost that states used when the certification process was first created in 1970. See Pub. L. No. 91-224, § 21(b)(1), 84 Stat. 91 (1970) (requiring certification that federally licensed “activity will be conducted in a manner which will not violate applicable water quality standards”).

id. § 131.11, and an “antidegradation policy” requiring maintenance of all existing uses, *id.* § 131.12.¹⁵ Uses are designated “tak[ing] into consideration the use and value of water for public water supplies, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial, and other purposes including navigation.” *Id.* § 131.10(a).

The criteria, in turn, may be “numerical” or “narrative” in form. *Id.* § 131.11(b)(1). They may describe the chemical composition of the water, its physical properties (such as temperature or turbidity), or the *biology* of the aquatic ecosystem. The EPA has in recent years strongly encouraged states to establish biological criteria, because of a growing awareness that “[b]iological impairments from diffuse sources and habitat degradation can be greater than those caused by point source discharges.” EPA, *Biological Criteria: National Program Guidance for Surface Waters* 4 (Apr. 1990). It has also urged the inclusion of criteria specifically addressing the harms associated with “hydrologic” changes in a waterway—*i.e.*, changes in the movement or flow of water. See EPA, *Water Quality Standards for Wetlands*, *supra*, at 16; EPA, *Wetlands and 401 Certification*, *supra*, at 27.

The third component, an antidegradation policy, is mandated because of a recognition that the specific criteria may not anticipate all of the ways in which pollution may degrade a body of water by interfering with a particular existing use. Thus, for example, if release of some new chemical were threatening to render a lake unfit for swimming, that release could be barred under an anti-

¹⁵ Although only the former two components are specifically required by the Act, the antidegradation policy requirement has been in place since 1968 and has been a part of EPA’s water quality standard regulations since they were first promulgated in 1975. See EPA, *Questions and Answers On: Antidegradation* (Aug. 1985) (question 1). In the 1987 amendments to section 303, Congress made specific reference to “the antidegradation policy established under this section.” 33 U.S.C. § 1313(d)(4)(B).

degradation policy even if the state's water quality criteria did not address the acceptable level of that chemical in water.

In this instance, when petitioners applied for section 401 certification, the State of Washington had all three components of Water Quality Standards in place, and those standards had been fully approved by the EPA. The Dosewallips River was classified as "Class AA (Extraordinary)," which meant that it had a variety of designated uses, including migration, rearing and spawning of salmonid fish. Wash. Admin. Code §§ 173-201-045 (1)(b), -050, -080(31) (repealed 1992). Criteria were specified for levels in the water of fecal coliform organisms, dissolved gases, temperature, pH, turbidity and toxic materials. *Id.* § 173-201-045(1)(c) (repealed 1992). And an antidegradation policy provided, in relevant part, that "existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed." *Id.* § 173-201-035(8)(a) (repealed 1992).

Petitioners' argument is that the State was powerless to use the section 401 process to prevent an excessive diversion of water because none of its water quality criteria addressed this issue. There is no doubt, however, that the State could have promulgated a relevant criterion—*e.g.*, a specification of the number of salmon found in a given portion of the river at a given time of year or simply a specification of a minimum stream flow needed to maintain the designated use of the river as a habitat for fish. Thus, there is nothing in principle odd about a state conditioning a certification on maintenance of a minimum stream flow for the purpose of vindicating its Water Quality Standards.

Ultimately, what petitioners are saying is that the State of Washington had to ignore a threatened degradation of a designated and existing use of the river because it had not had the prescience to promulgate a specific criterion

addressing this kind of degradation. In order to arrive at this result, they are required to contend that the State's antidegradation policy is not an independently enforceable limitation on polluting activities but, instead, simply a guideline for the development of the controlling criteria. *See* Pet. Br. at 37-38. But this argument is untenable. There is simply no doubt that states can (indeed must) enforce their Water Quality Standards by protecting uses of waterways from degradation *regardless* of whether that degradation would also conflict with a specified water quality criterion.

As noted above, the State of Washington's antidegradation policy itself directly forbids any degradation of an existing use of a waterway. That prohibition, by virtue of the EPA's approval of the standards, became a requirement of federal law. *Arkansas v. Oklahoma*, 112 S. Ct. at 1059. It is also consistent both with the EPA regulations, which require that the policy protect "[e]xisting instream water uses and the level of water quality necessary to protect the existing uses," 40 C.F.R. § 131.12 (a)(1), and with every available EPA description of how the antidegradation component of Water Quality Standards operates, *see, e.g.*, EPA, *Questions and Answers On: Antidegradation*, *supra*, at 3 ("No activity is allowable under the antidegradation policy which would partially or completely eliminate any existing use whether or not that use is designated in a State's water quality standards.") (emphasis added); *id.* at 11 (a "violation of water quality standards" may involve "*either* the antidegradation policy or a criterion") (emphasis added).¹⁶

¹⁶ *See also* *Arkansas v. Oklahoma*, 112 S. Ct. at 1059 (accepting an EPA interpretation of a state's antidegradation requirement as a provision that would be violated if, but only if, "the discharge effected an 'actual detectable or measurable' change in water quality") (quoting an EPA administrative ruling); EPA, *Water Quality Standards for Wetlands*, *supra*, at viii ("The antidegradation policies contained in all State standards provide a powerful tool for the protection of wetlands and can be used by States to regulate point

It is not surprising, therefore, that the EPA has recognized on a number of occasions that antidegradation policies provide a proper, independent basis on which a state may deny or condition a section 401 certification. *See, e.g.,* Statement of Martha G. Prothro, *supra*, at 93-94 ("State antidegradation policies are an integral part of water quality standards and are therefore an integral part of State § 401 certifications."); EPA, *Water Quality Standards for Wetlands*, *supra*, at 24 ("Violation of water quality standards is often the basis for denials or conditioning through Section 401 certification. . . . States have based decisions on their general narrative criteria and antidegradation policies.") (emphasis added).

Moreover, the suggestion that an antidegradation policy is merely intended to guide the development of enforceable criteria makes no sense. If that were the goal, the regulations need only have required that criteria developed by the states be designed to protect existing uses. In fact, the regulations *do* state that "water quality criteria [should] protect [each] *designated* use." 40 C.F.R. § 131.11(a) (emphasis added). But the antidegradation requirement is then set out separately, and applies to every "existing" use, regardless of whether it is "designated" elsewhere in the Water Quality Standards. This distinction is but one more indication that an antidegradation policy is an *independent* check on potentially polluting activities. In sum, when the State of Washington was presented with a proposed project that threatened to degrade an existing beneficial use of a river, it was not only authorized but required under its federally mandated antidegradation policy to take action under section 401.

and nonpoint source discharges to wetlands in the same way as other surface waters.").

B. The Incorporation of State Law Requirements in Section 401(d) Provided an Alternative Basis for the State's Action.

As noted above, section 401(d) also authorizes states to impose conditions where necessary to assure compliance with "any other appropriate requirement of State law." 33 U.S.C. § 1341(d). While the scope of this phrase is unclear, and there must be some limits on the state laws that can be enforced through section 401 certifications, there must also be at least one category of state laws that is included within this authorization. Where, as here, a proposed activity would disrupt a use of a waterway designated in the State's Water Quality Standards, the State must at least be allowed to deny or condition a section 401 certification based on a state law that serves to prevent precisely that form of degradation.¹⁷ After all, all that this would mean would be enforcement of a state law that could have been part of the Water Quality Standards themselves.

Thus, here, the State of Washington had a statute providing that "[p]erennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values." Wash. Rev. Code § 90.54.020(3)(a) (1992). This same requirement could well have been a part of the Water Quality Standards. *See* EPA, *Wetlands and 401 Certification*, *supra*, at 27 (urging states to "include a narrative criterion in [their] water quality standards that requires maintenance of base flow necessary to protect the wetland's (or other waterbody's) living resources"). *See also* CWA § 510, 33 U.S.C. § 1370 (preserving the states' right to enforce any more stringent "requirement respecting control or abatement of pollution"). If the incorporation of state law in section 401(d) is to have any mean-

¹⁷ Of course, this issue does not matter if, as argued above, the State antidegradation policy is independently enforceable.

ing, it must at least extend to laws that are not in Water Quality Standards but serve the same purpose. For this reason as well, petitioners are simply incorrect in contending that the State somehow went beyond the types of concerns it was supposed to address when it was asked to issue a certification for the Elkhorn project under section 401.

IV. THERE IS NOTHING ANOMALOUS, OR UNDULY DISRUPTIVE, ABOUT REGULATION OF MINIMUM STREAM FLOWS UNDER SECTION 401 OF THE CLEAN WATER ACT.

Throughout the briefs of petitioners and their *amici*, there are suggestions that the action taken here constitutes a startling extension of the Clean Water Act into a new area, creating potential conflicts with existing state water law and/or FERC's national energy policies. But these efforts to find policy arguments to support hypertechnical statutory interpretations fall completely flat. As we have noted, EPA has repeatedly recognized that states play an appropriate role in regulating planned diversions of water caused by hydroelectric projects. Such state regulation, in turn, poses no threat to state regimes for water allocation or to FERC's oversight of facilities for the generation of electrical power.

A. Water Rights.

Petitioners' argument about water rights, as best we can understand it, is that the entire issue of the effects of "diversions" of water is categorically removed from consideration by states under section 401 because of two other provisions in the CWA—sections 101(g) and 510(2), 33 U.S.C. §§ 1251(g) and 1370(2). Section 101(g) preserves the "authority of each State to allocate quantities of water within its jurisdiction" as well as all "rights to quantities of water which have been established by any State." Section 510(2) then adds that "[e]xcept as expressly provided in [the Act], nothing in [the Act]

shall be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States."

These provisions do not, however, in some way eliminate the entire category of water diversions from consideration by states under the CWA. To begin with, it can hardly be claimed that allowing the State in this case to consider stream flows in the section 401 process encroached on the State's *own* "authority . . . to allocate quantities of water." It makes little sense for petitioners to cite provisions preserving state power in support of their argument that the issue of minimum stream flow should be determined entirely by a federal agency—FERC. Nor is there any actual conflict with a water right previously granted by the State.¹⁸ Thus, on their face, these sections of the CWA simply do not apply here.

In any event, the legislative history indicates that, even if applicable, these provisions would not preclude some regulation of water *quantity* for purposes of preserving water *quality*. Senator Wallop—the sponsor of the amendment adding section 101(g) to the Act in 1977—acknowledged this reality, stating:

Legitimate water quality measures authorized by this act may at times have some effect on the method of water usage. Water quality standards and their upgrading are legitimate and necessary under this act. The requirements of section 402 and 404 permits may incidentally affect individual water rights. . . . It is not the purpose of this amendment to prohibit those incidental effects.

123 Cong. Rec. 39,212 (1977).

¹⁸ Petitioners themselves apparently do not yet have a water rights permit from the State authorizing them to use water in the river to generate electricity. See Pet. Br. 39 & n.38. Moreover, regardless of how much water does or does not get diverted by the Elkhorn project, the rights of downstream property owners will not be affected because the total volume of water in the river below the project will not change.

In a similar vein, the EPA has taken the position that section 101(g) does not prevent protection of water quality but instead requires avoidance of interference with water rights *where possible*. It stated:

The exact limitations imposed by section 101(g) are unclear; however, the legislative history and the courts interpreting it do indicate that it does not nullify water quality measures authorized by CWA . . . even if such measures incidentally affect individual water rights; those authorities also indicate that if there is a way to reconcile water quality needs and water quantity allocations, such accommodation [sic] should be pursued. In other words, where there are alternate ways to meet the water quality requirements of the Act, the one with least disruption to water quantity allocations should be chosen.

EPA, *Questions and Answers On: Antidegradation*, *supra*, at 11. See also *Riverside Irrigation Dist. v. Andrews*, 758 F.2d at 513 ("A fair reading of the statute as a whole makes clear that, where both the state's interest in allocating water and the federal government's interest in protecting the environment are implicated, Congress intended an accommodation.").

In any event, petitioners' argument proves too much. They concede that a state could properly consider some of the effects of a dam—*i.e.*, the discharge of water that, because of the dam, now has "low dissolved oxygen, dissolved minerals and nutrients, cooled water, sediment, or dissolved gases such as nitrogen," Pet. Br. at 27 n.18. See *id.* at 29. This means that a state could force a redesign of a dam to minimize these effects or could deny certification of a dam altogether. But petitioners then argue that the state cannot consider another effect of a proposed dam—destruction of fisheries—simply because the remedy for that form of degradation is to increase the volume of undiverted water. This distinction is untenable. In *either* case, application of section 401 could have the effect of interfering with a party's full exploita-

tion of a water right. But Congress clearly intended to allow such incidental interference, where necessary to protect water quality. In sum, the contention that a ruling upholding the State's actions in this case will encroach too far on the State's own jurisdiction over water allocation is insupportable.

B. Energy Policy.

It is equally untenable to suggest that allowing states to regulate minimum stream flows will disrupt FERC's overall regulation of the national system for generation of electricity. A state may deny or condition a certification for a project only where its action is "reasonably related" to the enforcement of the substantive provisions incorporated in sections 401(a) and 401(d). *Cf. Escondido Mut. Water Co.*, 466 U.S. at 776. That limitation, in turn, is fully enforceable in court. Here, for example, petitioners argued below that the stream flow condition was excessive because it was designed to "enhance" rather than "preserve" the existing use of the river as a fishery. Ultimately, however, they lost on this contention.

Thus, what petitioners are suggesting is that FERC's regulatory activities will be disrupted because it will no longer have the option of approving projects like theirs—projects that would violate a state's federally mandated Water Quality Standards. But Congress plainly did not intend to allow FERC that option. It authorized FERC to balance environmental and other concerns only *after* states certify compliance with Water Quality Standards. See note 3 *supra*; H.R. Conf. Rep. No. 495, 99th Cong., 2d Sess. 22 (1986) ("Projects licensed years earlier must undergo the scrutiny of today's values as provided in this law and other environmental laws applicable to such projects. If nonpower values cannot be adequately protected, FERC should exercise its authority to restrict or, particularly in the case of original licenses, even deny a license on a waterway.") (emphasis added). In so doing, Congress also added a directive to consider energy con-

servation measures as an alternative means of meeting demand for electrical power. 16 U.S.C. §§ 797(e), 803(a)(2)(C). There is no basis for petitioners' implicit request that this Court second-guess these legislative policy judgments.

CONCLUSION

The decision of the Supreme Court of Washington should be affirmed.

Respectfully submitted,

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